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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT TACOMA

7 PAUL CARNEY,

8 Plaintiff,

9 v.

10 C. WARNER, *et al.*,

11 Defendants.

No. C08-5653 BHS/KLS

REPORT AND RECOMMENDATION

Noted for: February 19, 2010

12 Before the Court is the motion for summary judgment of Defendant C. Warner. Dkt. 37.
13 Defendant Warner originally filed a Rule 12(b)(6) motion to dismiss on September 23, 2009.
14 Dkt. 30. On October 14, 2009, Plaintiff Paul Carney filed his response. Dkt. 34. On November
15 23, 2009, the court converted the motion to dismiss to a motion for summary judgment and
16 issued a revised briefing schedule. Dkt. 35. Defendant Warner filed her motion for summary
17 judgment and supporting declaration on December 10, 2009. Dkts. 37 and 38. On January 6,
18 2010, Defendant Warner filed a reply and supporting declaration. Dkts. 40 and 41. Mr. Carney
19 did not file a response to the newly filed motion for summary judgment.
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21 Having carefully reviewed the motion and balance of the record, and viewing the
22 evidence in the light most favorable to Mr. Carney, the undersigned recommends that the
23 Defendants' motion for summary judgment be granted on the grounds that Mr. Carney's claims
24 are barred by the applicable statute of limitations.
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FACTUAL BACKGROUND

The following background summary and recitation of facts is based on the verified complaint, and the declarations and exhibits filed in support of Defendants' motion, which are not disputed by Plaintiff.

A. Procedural Background and Plaintiff's Allegations

Mr. Carney initially filed this Section 1983 lawsuit in the United States District Court for the Eastern District of Washington ("Eastern District") on September 22, 2008. Dkt. 1; Dkt. 32, ¶ 5. Defendant Warner was named as a defendant but was not served with a summons or complaint in that action. Dkt. 32. On October 6, 2008 the Eastern District, on its own motion, issued an order requiring Mr. Carney to amend or voluntarily dismiss his complaint. Dkt. 3. Mr. Carney voluntarily dismissed one defendant and the Eastern District transferred his remaining claims to this court. Dkt. 5. On November 12, 2008, Mr. Carney was ordered to amend his complaint or show cause why it should not be dismissed for failure to state a claim. Dkt. 7. Mr. Carney's Amended Complaint was filed on February 20, 2009. Dkt. 11. Defendant Warner was served with the Amended Complaint on April 15, 2009. Dkt. 32, ¶ 6, Dkt. 19.

As to Defendant Warner, Mr. Carney alleges that on August 23, 2005, he was ordered to sign a behavior contract that violated his First Amendment rights because he claims it prohibited him from complaining about the program or anything else, including his lack of medical treatment. Dkt. 11, p. 3. Mr. Carney further alleges that on August 11, 2005, Defendant Warner refused to change his work schedule so that he could participate in the exercise part of his medical treatment. *Id.* In addition, he claims that the contract he was ordered to sign was altered from the standard thirty days to nine months, in violation of his Eighth Amendment right to be free from cruel and unusual punishment. *Id.*

1 Dkt. 37, pp. 2-6. Finally, Mr. Carney alleges that on September 16, 2005, he was transferred to
2 Washington Corrections Center (WCC), just three days prior to his Drug Offender Sentencing
3 Alternative (DOSA) revocation hearing. *Id.* Mr. Carney claims that the transfer violated his
4 Fifth and Fourteenth Amendment rights because it hindered his ability to call witnesses on his
5 behalf. *Id.*; Dkt. 34, p. 2.

6 **B. Background Facts**

7 **1. Drug Charge Conviction and DOSA Sentencing**

8 Mr. Carney was convicted on a drug charge and was given a DOSA sentence. Dkt. 31, ¶
9 3; Dkt. 31, Exh. 1. DOSA status generally requires an inmate to participate in a chemical
10 dependency treatment program while incarcerated, once the inmate has been assessed and
11 determined to be chemically dependent. *Id.*, ¶ 4. If the offender complies with the program
12 requirements, he is entitled to an early release date. *Id.* Conversely, if an inmate does not
13 comply with chemical dependency program requirements, his DOSA status will be revoked and
14 he will not benefit from an early release date. *Id.*

15 Mr. Carney admits that he was a DOSA offender and that he was required to participate
16 and complete a chemical dependency program as a condition of his DOSA status and sentence.
17 Dkt. 38, Exh. A, Request Nos. 1 and 4. He also admits that he agreed to fully participate in all
18 required substance abuse programs, although he asserts that he was not placed into the program
19 for which he had been assessed. *Id.*, Request No. 5.

20 **2. Chemical Dependency Treatment Agreement**

21 Mr. Carney signed and dated a DOSA agreement and an “Affirmation of Chemical
22 Dependency” on June 17, 2003. Dkt. 31, Exh. 2. Mr. Carney agreed to “fully participate in all
23 required substance abuse treatment programs.” *Id.*

1 **3. Participation in the Integrity Program at LCC**

2 Mr. Carney was incarcerated at the Larch Corrections Center (LCC) from May 20, 2005
3 to September 14, 2005. Dkt. 31, ¶ 5. He was a participant in the Integrity program at LCC from
4 his intake on May 20, 2005 through August 26, 2005. *Id.*, and see Exh. 3. Upon his arrival at
5 LCC on May 20, 2005, Mr. Carney signed an agreement detailing the participation requirements
6 and terms and conditions of the chemical dependency program he was required to fulfill while
7 incarcerated at LCC. *Id.*, ¶ 6; Exh. 4. The chemical dependency Treatment Participation
8 Expectations agreement provides in part:
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10 Those offenders sentenced under the Drug Offender Sentencing Alternatives
11 (DOSA) SHALL:

- 12 1. Sign the DOSA agreement (DOC 20-260)
- 13 2. Complete primary treatment and a minimum of three (3) months of
14 outpatient treatment upon release from total confinement; and
- 15 3. Sign your dated signature below indicating that you understand what is
16 expected of you as a DOSA offender, and that if you are unsuccessfully
 discharged from any level of Chemical Dependency treatment, DOC
 may revoke your DOSA sentence and require you to serve the remainder
 of your sentence as imposed by the sentencing court.

17 *Id.*

18 **4. Behavior Contract**

19 Mr. Carney signed a behavior contract on May 20, 2005 when he arrived at LCC. Dkt.
20 31, ¶ 7 and see Exh. 5. Mr. Carney entered the Integrity program at LLC on a behavior contract
21 due to his infractions and violations while a participant in the Legacy program at his prior
22 institution, Coyote Ridge Corrections Center (CRCC). *Id.*, ¶ 8. After a hearing at CRCC, Mr.
23 Carney was found guilty of a “557” infraction – a “failure to program” pursuant to WAC 137-25-
24 030. In other words, he was noncompliant with program requirements and refused to participate
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1 while still at that institution. *Id.* His noncompliance just prior to transfer from CRCC to LCC is
2 the reason he was put on a behavior contract immediately upon arrival at LCC.

3 A behavior contract is an agreement between the inmate, a representative of DOC and a
4 representative of the chemical dependency program. Dkt. 31, ¶ 7. The purpose of the behavior
5 contract is to hold an inmate accountable for his or her actions and to impart a heightened sense of
6 self-awareness. *Id.* The contract is generally entered into after the inmate has already broken
7 program rules on numerous occasions *Id.* Mr. Carney maintained compliance with all of the
8 terms and conditions of the May 20, 2005 behavior contract, which ended on June 20, 2005. *Id.*

10 **5. Refusal to Participate in Integrity Program**

11 Throughout the month of August 2005, Mr. Carney was demonstrating negativity, a lack
12 of sincere participation, and defiance toward the Integrity program and program activities. Dkt.
13 31, ¶ 9. At a meeting with Integrity staff members regarding his behavior on August 26, 2005,
14 Mr. Carney was asked to sign another behavior contract. *Id.* He refused to sign and requested to
15 be removed from the Integrity program. *Id.* He told Integrity staff members “Stop right now. I
16 am not signing a behavior contract. I want out . . . I’m done.” *Id.* Mr. Carney admits that he
17 refused to sign a second behavior contract and that he told Integrity staff members that he was
18 “done” with the program and wanted out, and also stated that he believed the contract violated
19 his civil rights and was cruel and unusual punishment. Dkt. 38, Exh. A, Request No. 9.
20 Because of his refusal to participate in the Integrity program, Mr. Carney was issued a “762”
21 infraction and automatically referred to DOC for a hearing to determine revocation of his DOSA
22 status.
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1 **6. Revocation of DOSA Status**

2 After the meeting with Integrity staff members on August 26, 2005, Mr. Carney was
3 immediately placed in the secured housing unit by the Department of Corrections personnel at
4 LCC to await his hearing regarding DOSA revocation. Dkt. 31, ¶ 11. DOC transferred Mr.
5 Carney out of LCC to Washington Corrections Center (WCC) in Shelton, Washington on
6 September 14, 2005. *Id.* A DOSA revocation hearing was held by DOC at WCC and Mr.
7 Carney's DOSA status was revoked. *Id.* All DOSA revocation hearings are held at WCC in
8 Shelton Washington. Dkt. 31, ¶ 12.

10 **7. Transfer to WCC**

11 Ms. Carney has no control over decisions regarding the location of inmates, their level of
12 confinement, the decision to transfer them, the date of transfer and other confinement related
13 issues. Dkt. 31, ¶ 12. She has no control over offender sentencing. *Id.*

14 Mr. Carney admits that he left LCC on September 13, 2005. Dkt. 38, Exh. A, Request
15 No. 10. Mr. Carney further admits that he filed the instant lawsuit against Defendant Warner on
16 February 20, 2009. Dkt. 38, Exh. A, Request No. 11. However, a review of the court file shows
17 that C. Warner was named in the initial complaint filed in the Eastern District of Washington on
18 September 22, 2008 and that the initial complaint alleged similar allegations against Defendant
19 Warner.
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21 **STANDARD OF REVIEW**

22 Summary judgment shall be rendered if the pleadings, exhibits, and affidavits show that
23 there is no genuine issue as to any material fact and that the moving party is entitled to judgment
24 as a matter of law. Fed. R. Civ. P. 56(c). In deciding whether summary judgment should be
25 granted, the court must view the record in the light most favorable to the nonmoving party and
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1 indulge all inferences favorable to that party. Fed. R. Civ. P. 56(c) and (e). When a summary
2 judgment motion is supported as provided in Fed. R. Civ. P. 56, an adverse party may not rest
3 upon the mere allegations or denials of his pleading, but his response, by affidavits or as
4 otherwise provided in Fed. R. Civ. P. 56, must set forth specific facts showing there is a genuine
5 issue for trial. Fed. R. Civ. P. 56(e). If the nonmoving party does not so respond, summary
6 judgment, if appropriate, shall be rendered against that party. *Id.*

8 The moving party must demonstrate the absence of a genuine issue of fact for trial.
9 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). Mere disagreement or the bald
10 assertion that a genuine issue of material fact exists does not preclude summary judgment.
11 *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466,
12 1468 (9th Cir. 1987). A “material” fact is one which is “relevant to an element of a claim or
13 defense and whose existence might affect the outcome of the suit,” and the materiality of which
14 is “determined by the substantive law governing the claim.” *T.W. Electrical Serv., Inc. v. Pacific*
15 *Electrical Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

17 Mere “[d]isputes over irrelevant or unnecessary facts,” therefore, “will not preclude a
18 grant of summary judgment.” *Id.* Rather, the nonmoving party “must produce at least some
19 ‘significant probative evidence tending to support the complaint.’” *Id.* (quoting *Anderson*, 477
20 U.S. at 290); see also *California Architectural Building Products, Inc.*, 818 F.2d at 1468 (“No
21 longer can it be argued that any disagreement about a material issue of fact precludes the use of
22 summary judgment.”). In other words, the purpose of summary judgment “is not to replace
23 conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.”
24 *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990).

1 “A plaintiff’s belief that a defendant acted from an unlawful motive, without evidence
2 supporting that belief, is no more than speculation or unfounded accusation about whether the
3 defendant really did act from an unlawful motive.” *Carmen v. San Francisco Unified School*
4 *Dist.*, 237 F.3d 1026, 1028 (9th Cir. 2001).

5 **DISCUSSION**

6 Defendant Warner moves for dismissal of Mr. Carney’s claims against her because (1)
7 the claims are barred by the applicable statute of limitations, (2) Mr. Carney has failed to state a
8 claim under 42 U.S.C. § 1983, (3) there is no evidence that Plaintiff’s constitutional rights under
9 the First, Eighth, Fifth and Fourteenth Amendments were violated, and (4) Ms. Warner did not
10 personally participate in the revocation of Mr. Carney’s DOSA. Dkt. 37, p. 6.

11 Mr. Carney did not address the statute of limitations in his response to Defendant’s
12 motion to dismiss. Dkt. 34. Defendant Warner raised the same issue in her motion for summary
13 judgment (Dkt. 37), but Mr. Carney did not file a response to the converted motion.
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15 As explained further below, after considering the record and all inferences in the light
16 most favorable to Mr. Carney, the court finds that his claims are barred by the applicable statute
17 of limitations. Thus, the Court need not consider the substantive grounds for dismissal.
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19 **A. Statute of Limitations**

20 The Civil Rights Act, 42 U.S.C. § 1983, contains no statute of limitations. As such,
21 the statute of limitations from the state cause of action most like a civil rights act is used. In
22 Washington, a plaintiff has three years to file an action. *Rose v. Rinaldi*, 654 F.2d 546 (9th Cir
23 1981). The Washington statute for personal injury reads as follows:
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25 The following actions shall be commenced within three years: . . . (2) An action
26 for taking, detaining, or injury personal property, including an action for the

1 specific recovery thereof, or for any other injury to the person or rights of another
2 not hereinafter enumerated.

3 RCW 4.16.080(2) (emphasis added).

4 Federal law determines when a civil rights claim accrues. *Tworivers v. Lewis*, 174 F.3d
5 987, 991 (9th Cir. 1999). A claim accrues when the plaintiff knows or has reason to know of the
6 injury which is the basis of the action. *Kimes v. Stone*, 84 F.3d 1121, 1128 (9th Cir. 1996); see
7 also *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001), quoting *Tworivers*, 174 F.3d at 992.
8 The proper focus is upon the time of the discriminatory acts, not upon the time at which the
9 consequences of the acts became most painful. *Abramson v. Univ. of Hawaii*, 594 F.2d 202, 209
10 (9th Cir. 1979).

11
12 Mr. Carney's complaint reveals that he had actual notice of the facts giving rise to a
13 claim in sufficient time to commence an action before the expiration of the three year statute of
14 limitations. Mr. Carney alleges that the events for which he brought his lawsuit occurred on
15 August 23, 2005, when he was ordered to sign a behavior contract; on August 11, 2005, when
16 Defendant Warner allegedly refused to change his work schedule; and, on September 16, 2005,
17 when he was transferred to WCC. Dkt. 11, p. 3. Ms. Warner is the only named defendant who
18 was a CiviGenics employee at LCC during the time of the events related to Plaintiff's claims in
19 this matter. Dkt. 31, ¶ 2. Thus, any and all acts alleged by Mr. Carney against Ms. Warner
20 would have had to occur during his incarceration at LCC from May 20, 2005 through September
21 13, 2005. *Id.*, at 5; Dkt. 38, Exh. A, Request No. 10.

22
23 Mr. Carney initially filed this Section 1983 lawsuit in the Eastern District on September
24 22, 2008. Dkt. 1. Defendant Warner was not served with a summons or complaint in that action
25 (Dkt. 32) prior to the time Mr. Carney's lawsuit was transferred from the Eastern District.
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1 Therefore, the Eastern District never acquired personal jurisdiction over her. More importantly,
2 however, at the time Mr. Carney filed his lawsuit in the Eastern District, the statute of limitations
3 had already lapsed as to any claims against Ms. Warner, as that action was not filed until
4 September 22, 2008 – at least three years and thirty-four days after Mr. Carney was terminated
5 from the Integrity program on August 26, 2005, and three years and eight days after Mr. Carney
6 was transferred from LCC. Dkt. 37, p. 9.

7
8 Following transfer of his claims to this Court, Mr. Carney filed an Amended Civil Rights
9 Complaint on February 20, 2009. Dkt. 11. Defendant Warner was served with the Amended
10 Complaint on April 15, 2009. Dkt. 32, ¶ 6, Dkt. 19. However, as noted above, his claims
11 against Defendant Warner for alleged conduct in August and September of 2005, had already
12 expired. Additionally, the summary judgment evidence reflects that Ms. Warner was not
13 involved in Mr. Carney's transfer and has no control over inmate transfers, and that all DOSA
14 revocation hearings are held at WCC. Dkt. 31, ¶ 12.

15
16 Thus, after viewing the facts in the light most favorable to Mr. Carney, the undersigned
17 finds that his claims are barred by the statute of limitations and further, that there is no evidence
18 of circumstances indicating that the statute should be equitably tolled.

19 **B. Equitable Tolling**

20 In § 1983 actions, courts apply the forum state's statute of limitations for personal injury
21 actions, along with the forum state's law regarding tolling, including equitable tolling, except to
22 the extent any of these laws are inconsistent with federal law. *Fink v. Shedler*, 192 F.3d 911, 914
23 (9th Cir. 1999); see also *Board of Regents of University of State of N.Y. v. Tomanio*, 446 U.S.
24 478 (1980).
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1 The doctrine of equitable tolling prevents a defendant from asserting the statute of
2 limitations when a defendant's actions have fraudulently, deceptively or in bad faith induced
3 plaintiff to delay commencing suit until the applicable statute of limitations has expired. *Del*
4 *Guzzi Constr. Co., Inc. v. Global Northwest Ltd., Inc.*, 719 P.2d 120 (1986). For the doctrine of
5 equitable tolling to be applicable, a defendant must have actively concealed or misrepresented
6 facts, or otherwise interposed a hindrance or impediment that prevented plaintiff from
7 discovering or suing on the claim. *Wood v. Gibbons*, 685 P.2d 619, review denied, 103 Wn.2d
8 1009 (1984). In addition, a defendant is not equitably estopped from raising a statute of
9 limitations defense when the plaintiff had actual notice of the facts giving rise to a claim in
10 sufficient time for the plaintiff to commence an action before the expiration of the statute period.
11 *Helgeson v. City of Marysville*, 881 P.2d 1042 (1994).
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13 Based on a review of the record, the undersigned finds that equitable tolling does not
14 apply to the facts of this case. Mr. Carney offers no explanation at all for why he waited over
15 three years before bringing this action against Defendant Warner.
16


17 CONCLUSION

18 For the foregoing reasons, the undersigned recommends that Defendant Warner's motion
19 for summary judgment (Dkt. 37) be **GRANTED** and that Plaintiff's claims be dismissed with
20 prejudice as they are barred by Washington's three-year statute of limitations.
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22 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil
23 Procedure, the parties shall have fourteen (14) days from service of this Report to file written
24 objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those
25 objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the
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1 time limit imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on
2 **February 19, 2010**, as noted in the caption.

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4 DATED this 25th day of January, 2010.

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8 Karen L. Strombom
9 United States Magistrate Judge
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